REGINA B. PERRY

IBLA 94-887 Decided January 28, 1998

Appeal from a decision of the Area Manager, Walker Resource Area, Nevada, Bureau of Land Management, setting the fair market value rental rate for Land Use Permit N-48148 and requiring payment of rental.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Permits--Rent

   Holders of a land use authorization shall pay rental in advance, annually or otherwise, as determined by the authorized officer. The rental shall be based upon either the fair market value of the rights authorized in the land use authorization or as determined by competitive bidding. In no case shall the rental be less than fair market rental.

2. Appraisals--Federal Land Policy and Management Act of 1976: Permits--Rent

   The BLM's fair market value determination will be affirmed if the appellant does not demonstrate error in the appraisal method or otherwise present convincing evidence that the fair market value determination is erroneous. The case file must contain the facts and an analysis sufficient to allow the Board to conclude that the fair market value determination is supported by the record. Where there is no showing of error in BLM's appraisal method, it normally must be rebutted by another appraisal.

APPEARANCES: Peter A. Perry, Esq., and Victor A. Perry, Esq., Reno, Nevada, for Appellant.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Regina B. Perry has appealed from an August 30, 1994, rental determination of the Area Manager, Walker Resource Area, Nevada, Bureau of Land Management (BLM). The Decision set the fair market rental for Land Use Permit (LUP) N-48148 and directed Perry to submit the rental payment.

The original permit to operate a drive-in theater was issued as a temporary use permit on March 9, 1980. On March 9, 1985, LUP 030-324 was issued to Perry for a 3-year period. An appraisal report was prepared on March 9, 1985, and it was reviewed and approved on April 29, 1987. This appraisal report was the basis for determining fair market value of the land so that an annual rental could be established. The appraisal examined comparable values and found the fee value of the permit area to be $18,000. The value of the right to use the land was estimated to be 95 percent of the fee value, and a 10-percent rate of return (interest rate) was applied. Finally, that figure was discounted 20 percent due to the presence of mining claims that predated the permit and constituted valid existing rights. (1987 Appraisal at 2.) The annual rental thus was determined to be $1,400 per year.

The LUP was renewed with a new serial number, N-48148, for another 3-year period, effective March 9, 1988. It was determined that the fair market value of the land had not changed since the last renewal, and accordingly, the annual rental remained the same. When Perry applied to renew the LUP in 1991, the 1987 appraisal was again reviewed. When a search of the Lyon County Assessor's Office records revealed no change in land values, the 1987 appraisal was used as the basis for the annual rental calculation. However, the rate of return was set at 8 percent, which resulted in a lower rental of $1,100 per year.

This appeal involves the rental determination made for the 3-year period commencing on March 9, 1994. That determination was based on a new appraisal (1994 Appraisal Report) approved August 23, 1994, which concluded that annual rental should be $1,900 per year. This calculation was based on a fair market value of $24,000 and a rate of return of 8 percent, which resulted in a rental of $ 1,920 rounded to $1,900. The fair market value was not discounted for mining claims because the claims were determined to be "abandoned or closed" prior to the appraisal. (1994 Appraisal Report at 15.) Moreover, the appraiser stated his opinion that "there are no adverse covenants, conditions or restrictions on the property," id., and he therefore concluded that the use was "considered to be 100% of the surface rights." Id. at 4.

In her Statement of Reasons (SOR), Perry objects to the rate of return used in the appraisal and to the properties used in determining comparable rates to establish fair market value. She also objects to the appraiser's failure to consider restrictions that are "inherent in any lease from BLM"

and normally not present in private sector land sales. (SOR at 1.) Citing Exxon Corp., 106 IBLA 207, 212 (1988), Perry notes seven such restrictions as examples:

a. Tenure;

b. Right to reappraise every 5 years;

c. Annual payments;

d. More restrictive land rehabilitation requirements in some areas;

e. Right of revocation;

f. Right to require changes in use if land is needed for a public project;

g. Rights to authorize other grants if right away over property [sic].

(SOR at 1-2.)

Perry further argues that

> the appraiser used private sector property as comparables, which for a sale of the property free and clear of the Government restrictions and encumbrances might be valid. But to extrapolate from private sector values, an unencumbered sales value on a piece of property that is full of restrictions and encumbrances is replete with error and inherently contradictory.

Id. at 2. Perry contends she has thus shown error in BLM's appraisal and that it therefore must be set aside or the appraised value must be adjusted. In support of her contentions, she cites this Board's decision in Mathilda B. Williams, 124 IBLA 7 (1992), wherein we set the appraisal aside and remanded the case to BLM because the appraiser failed to consider 11 restrictive lease clauses limiting the use and enjoyment of the right-of-way.

[1] Section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (1994), authorizes the Secretary to issue permits for various uses of the public lands. The United States is to receive fair market value for the use of public lands at all times. Section 102(a)(9) of FLPMA, 43 U.S.C. § 1701(a)(9) (1994). Applicable regulations are found at 43 C.F.R. Part 2920, and these require that land use authorizations shall be issued only at fair market value and only for uses that conform to BLM plans, policy, objectives, and resource management programs. 43 C.F.R. § 2920.0-6(a). Under 43 C.F.R. § 2920.1-1, BLM may

authorize "[a]ny use not specifically authorized under other laws or regulations and not specifically forbidden by law," including "residential, agricultural, industrial, and commercial" uses. C Bar C Ranch Partnership, 132 IBLA 261, 267 (1995); Sierra Production Service, 118 IBLA 259 (1991); see also Steve Medlin, 115 IBLA 92 (1990). The regulations also state:

> Holders of a land use authorization shall pay annually or otherwise as determined by the authorized officer, in advance, a rental as determined by the authorized officer. The rental shall be based either upon the fair market value of the rights authorized in the land use authorization or as determined by competitive bidding. In no case shall the rental be less than fair market rental.

43 C.F.R. § 2920.8(a)(1).

[2] Thus, BLM clearly is required to charge "fair market value" for a UP. As a rule, BLM's fair market value determination will be affirmed if the appellant does not demonstrate error in the appraisal method or other-wise present convincing evidence that the fair market value determination is erroneous. See, e.g., Thousand Peaks Ranches, 129 IBLA 397 (1994); Coy Brown, 115 IBLA 347 (1990); Thomas L. Sawyer, 114 IBLA 135 (1990). How-ever, the case file must contain the facts and an analysis sufficient to allow the Board to conclude that the fair market value determination is supported by the record. See Communications Enterprises, Inc., 105 IBLA 132 (1988); High Country Communications, Inc., 105 IBLA 14 (1988); Clinton Impson, 83 IBLA 72 (1984); Full Circle, Inc., 35 IBLA 325, 85 Interior Dec. 207 (1978). Where there is no showing of error in BLM's appraisal method, it normally must be rebutted by another appraisal. Great Co., 112 IBLA 239, 242 (1989), and cases there cited.

Fair market value is the "amount in cash, or on terms reasonably equivalent to cash, for which in all probability the property would be sold by a knowledgeable owner willing but not obligated to sell to a knowledgeable purchaser who desired but is not obligated to buy." (Uniform Appraisal Standards for Federal Land Acquisitions (Uniform Appraisal Standards) (1992), at 4.) Fair market value is determined with reference to the property's "highest and best use," defined as "the reasonably probable and legal use of vacant land or improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value." (1994 Appraisal Report at 14, (citing The Appraisal of Real Estate, Tenth Edition, at 275).)

The 1994 appraisal states that the land is presently zoned as M-1 Industrial, but concluded that "with the demand for residential sites in this area, * * * a zoning change could be obtained for residential." (1994 Appraisal Report at 15.) The 1994 Appraisal Report also determined that residential development was physically possible and financially feasible. (1994 Appraisal Report at 15.) The 1994 Appraisal Report thus concluded that such development was the "highest property use that met

the legal, physical and feasible [sic] criteria." (1994 Appraisal Report at 16.) The 1987 appraisal asserted that industrial development or residential development was the highest and best use, but noted that the local economy was "slack" at that time. (1987 Appraisal Report at 1.) In contrast, the later appraisal opined that the area had a "stable economy supported by mining, tourism, gaming, and agriculture" which "should be assured of steady growth for years to come." (1994 Appraisal Report at 6.)

The appraiser reviewed three methods of data analysis used to estimate property value and concluded that the Sales Comparison (or market) approach was the appropriate method in this case, the same method used in the earlier appraisal. When using this method, the appraiser evaluates sales of comparable parcels, adjusting those sale prices to reflect differences among various value factors, and establishes the fair market fee value of the subject site. In this case, the appraiser selected eight comparables. After researching county records and BLM appraisal data files and conducting field examinations of the eight, the four most similar transactions were selected. Id. at 16. He further analyzed those four transactions to arrive at fair market value.

In the 1987 appraisal, BLM determined that the value of the rights conveyed by the LUP during a "slack" economy was equivalent to 95 percent of the fee value and adjusted the value to account for the presence of unpatented mining claims. No such adjustment was made in the 1994 appraisal, because in the absence of such mining claims, use of the land was considered to be 100 percent of the surface.

The 1994 Appraisal Report identified points of comparison and factors that influence value when looking at the comparable properties. The specific bases for concluding that the four transactions are comparable were set forth in some detail. (1994 Appraisal Report at 19-21.) Access was one of the factors considered, because "[e]asements, rights-of-way, and private and public restrictions effect [sic] property value." (1994 Appraisal Report at 17.) The sales analysis of the four comparables shows that access was considered in terms of access to roads, and not easements, rights-of-way or restrictions that might affect property values, because the appraiser had concluded that there were no such restrictions. Id. at 15.

Although Perry argues that the land is subject to many restrictions and encumbrances, she has not identified any specific restriction or encumbrance or shown why the 15 standard terms and conditions and the 2 special stipulations that actually govern her permit preclude comparison with privately owned parcels. Appellant relies on Exxon Corp., supra. That case involved a sale of public land to construct a natural gas processing plant, and the questions of whether it was proper to define the highest and best use of the parcel "by referring solely to Exxon's intended use" of the land, and whether the expenditure of $870,000 to meet certain uniquely Federal requirements (compared to $10,600 for the private land) should have been considered in establishing fair market value. Exxon Corp., supra, at 210, 212. However, those questions have not been raised in this appeal.

Perry also relies upon Mathilda B. Williams, 124 IBLA 14 (1992), to support her assertion that BLM erred in comparing the subject parcel to private land. The restrictions in the lease in Mathilda B. Williams were severe, and they clearly and directly affected the appellants' use and enjoyment of the access roads to their privately owned land, all of which was located within a wilderness area. We summarized those restrictions as follows:

> The proposed lease contained major restrictions on the use and enjoyment of the roads. The roads could be used only by the lessees, and the lessee would be required to provide transportation for all contractors and/or clients to and from the Lessee's [sic] land in Lessee-owned vehicles, unless BLM authorized the use of other vehicles. The lessees were responsible for all maintenance made necessary by their use of the roads, and when maintaining the roads no mechanized equipment could be used without prior written BLM approval. No vehicular traffic was permitted during periods of "wet road conditions," i.e., when tires would leave ruts in excess of 1-1/2 inches. BLM retained the right to close the roads "when weather conditions are adverse, erosion problems are occurring or the road has been damaged by either man's activity or an Act of Nature." The lease was not transferrable and would terminate upon sale of their private inholdings.

Id. at 9-10.

No such terms and conditions appear in Perry's permit. Indeed, compared to those in Mathilda B. Williams, the terms and conditions and special stipulations of Appellant's permit are so basic and commonplace as to be rather easily comparable to private transactions. As we have observed, however, Appellant has not provided any evidence demonstrating that the appraiser's conclusion that the land is not burdened by encumbrances or restrictions is incorrect, and she has not identified or shown why a specific term, condition, or special stipulation of her permit precludes comparison to the four properties actually utilized in the 1994 Appraisal Report. Moreover, she has not questioned or contested any of the other points of comparison or findings that support the use of the four properties for comparable sales. We thus find that Perry has presented no evidence contradicting BLM's highest and best use determination, and she has not shown any error in the method by which the four comparables used in the appraisal were selected.

Perry also challenges the use of an 8-percent rate of return, arguing it is "unrealistic and arbitrary." (SOR at 1.) She contends that a 3- to 5-percent rate of return would be "more realistic" because of the low prime rate and low rate on other Government instruments in the 3 years preceding the date of the appraisal. (SOR at 1.) In the absence of a demonstrated error in using an 8-percent rate, Perry has articulated no more than a difference of opinion. See C Bar C Ranch Partnership, supra.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision is affirmed.

_____
T. Britt Price
Administrative Judge

I concur:

_____
Gail M. Frazier
Administrative Judge